

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	GN Docket No. 00-185
Internet Over Cable and Other Facilities)	
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for)	CS Docket No. 02-52
Broadband Access to the Internet Over Cable)	
Facilities)	

COMMENTS OF
VERMONT PUBLIC SERVICE BOARD
AND
VERMONT DEPARTMENT OF PUBLIC SERVICE

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EXECUTIVE SUMMARY

America's citizens deserve the right to unrestricted Internet access over cable modem facilities. Cable modem service is a bottleneck service for many customers, and cable modem companies have the incentive and technical opportunity to place restrictions on customer access to the Internet. The Commission should establish the right of each cable modem customer to send and receive data on the Internet without restriction by the cable modem provider. This right would be very similar to the right of telephone customers under Title II of the Act.

The NPRM tentatively concluded that if cable modem service is telecommunications, then the Commission should forbear from regulating. This would limit state regulation. Because the extent of possible forbearance has not been well defined by the NPRM, it does not provide an adequate procedural basis for action. On the merits, forbearance may be justified for data-based services, but it is not justified for voice-carrying services.

justified.

The Commission has insufficient authority to preempt state regulation of cable modem services. It cannot preempt in areas where the commission itself has no authority to regulate. By placing cable modem service outside Title II, the Commission has simultaneously placed it outside the realm of possible preemption. Also, the Commission can preempt only as to "communications by wire or radio," not "capabilities," which describe information services.

Cable modem service requires significant regulatory attention. Vermont's recent experience shows that a poorly operated cable modem service can quickly lead to thousands of complaints. The Commission clearly does not appear have sufficient resources to handle such a

flow of complaints. If the Commission takes the jurisdiction, it should offer customers plausible assurances that it can handle their complaints at a quality comparable to that now provided by local and state consumer protection services, such as the Vermont Department of Public Service. It seems highly unlikely that the Commission can plausibly make that assurance based upon its current resources or any that it is likely to acquire.

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INTRODUCTION

The Vermont Public Service Board (“Vermont PSB”) is the utility regulatory body of the State of Vermont. The Vermont Department of Public Service is the utility public advocate for the State of Vermont. The two agencies (“Vermont Agencies”) are pleased to submit herewith their joint comments.

These comments are submitted in response to the Federal Communications Commission’s (the “Commission”) Declaratory Ruling and Notice of Proposed Rulemaking released on March 15, 2002 (“NPRM”). In that document, the Commission declared that cable modem service is an information service. The Vermont Agencies submit comments here assuming, *arguendo*, that the declaratory ruling will be sustained and therefore that the Commission has sufficient legal authority to protect important consumer interests.¹

I. THE COMMISSION SHOULD ESTABLISH THE RIGHT OF EACH CABLE MODEM CUSTOMER TO UNRESTRICTED INTERNET ACCESS .

The Commission asked parties to comment on whether the threat that subscriber access to Internet content or services could be blocked or impaired, as compared to content or services provided by the cable operator or its affiliate, is sufficient to justify regulatory intervention at this time.² The Vermont Agencies submit that the most important consumer protection of all is unrestricted Internet access, the right to send and receive communications free of editorial and

¹ do, There are, however, have serious doubts about whether the Commission has sufficient authority, under its claimed “ancillary jurisdiction,” to provide sufficient consumer protections. For this reason, the Vermont Agencies have intervened in the judicial review of that declaratory ruling in the pending proceeding *Brand X Internet Services v. FCC*, 9th Circuit Court of Appeals Docket No. 02-70518.

commercial restraints or discriminatory routing imposed by the provider of the Internet service or the facilities over which the data pass. Multiple ISP access is one way to implement this right, but the Commission should establish and articulate this right regardless of its action on the multiple ISP issue.

A. Consumers Have a Fundamental Interest in Avoiding Restrictions on their Right to Send and Receive Data Over Broadband Facilities.

Many citizens already obtain the majority of their information using broadband services such as DSL and cable modems. As broadband capability expands to more areas, citizens will increasingly rely on it for their news and information needs. Most citizens who cannot buy their favorite newspaper in one place generally can find it in another. But some rural customers probably will have only one economical choice: their cable television company's broadband cable modem service.³

The Vermont Board has considered full and unrestricted access to the Internet to be an important right of Vermont consumers. Two years ago, the Board issued franchise renewals to certain Vermont subsidiaries of Adelphia Communications Corporation, a cable company that serves a substantial majority of Vermont towns. The Board said in that Order:

. . . [O]ne can view issues of Internet access primarily from the standpoint of the end user, not of the various providers. Adelphia has represented that any part of the Internet can be accessed without restriction through its service, at a speed and ease of use comparable to independent or competing providers. **Freedom of the web, i.e., the broadest access possible for every subscriber, is vital for the future of Vermonters.** Adelphia's contribution to that goal is a major reason for our decision to

² NPRM ¶¶ 84, 87.

³ Satellite services are currently significantly more expensive than most cable modem services.

renew its franchises, and we expressly condition today's renewal on that commitment. We will tend to favor open access that gives subscribers better or freer access to the Internet, and we are less inclined to order open access solely to benefit a competitor. To the extent Adelphia keeps its commitment to unrestricted Internet access by its retail customers, we will feel less need to order unbundling of Adelphia's network.⁴

This right to unrestricted Internet access will only become more important as broadband technology improves and becomes more widespread. Customers will increasingly come to rely on their broadband connections. Some consumers will find those connections to be their most convenient source of information, news, and data, indeed to become the primary mode of access to information.

More than entertainment is at risk. Citizens need unrestricted access to broadband facilities, without restriction by persons controlling the Internet or the facilities used for communication, to fulfill their democratic duties. If facilities owners or Internet service providers can exercise control over Internet content in favor of their own political preferences, the most fundamental element of democracy itself will be at risk, the free and open exchanges of information by citizens.

B. Cable Modems are Bottleneck Access Facilities for Many Customers.

Broadband access via cable modem and broadband access via wireline telephone facilities (such as DSL) have different limitations that affect access. The combination of these limitations means that many Vermont customers will rely on cable modem service as their

⁴ Vermont PSB Docket Nos. 6101 and 6223, Order of April 28, 2000, at 137.

principal (and only terrestrial) source of broadband access. This kind of service are sometimes characterized as a “bottleneck” facility, or as an “essential facility.” The situation is unlikely to be much different in other rural parts of the country.

Many Vermont communities consist of a small central hamlet or small village surrounded by more recent development along maintained roadways. The more densely populated villages typically were settled in the early 1800’s. Much of the surrounding rural development is newer and occurred in the last 50 years when automobiles were more widely available. This settlement pattern has important implications for the deployment of various broadband technologies.

Cable television providers in Vermont are franchised at the state level. Once franchised in a town, a cable provider must provide service to any customer who can be reached by an extension of the provider’s existing lines that would meet a carrier-specific financial test.⁶

⁶ Under Public Service Board Rule 8.313(B) and (C), any company's line extension policy must conform to the following:

(B) Any line extension policy that shall require contributions in aid of construction shall incorporate what has been known as the "Newfane formula": $A = (C / N) * (1 - (N / (H * L)))$ where A is the dollar contribution from each new customer; C is the actual cost per mile of the line extension; N is the number of verified subscribers on the extension, who will be making the contribution in aid of construction; L is the length of the extension in miles; and H is a number designated by the cable company's tariff. H is the number of dwelling units per mile, counting all the miles proposed on the extension, above which the company will not require a contribution in aid of construction.

(C) The operator shall construct an extension to its existing system in any area of its certificated area where the density of homes passed per mile, including sparsely settled areas passed in order to reach the denser areas, is equal to or exceeds the value set for parameter H in its tariff.

See also, Petitions for renewal of Certificates of Public Good held by Mountain Cable Company and Better TV, Inc. of Bennington, both d/b/a Adelphia Cable Communications, PSB Docket No. 6101, Order of 4/28/00 at 113-121 (discussing measurement of house counts and related implementation issues).

Commonly this means that cable television providers must extend their lines whenever a buildout project has at least 15 homes per mile of roadway. When this buildout requirement is applied to Vermont settlement patterns, the result is a cable network that, in many townships, extends well out into the countryside.⁷

The patterns of DSL availability in Vermont is quite different. Nearly every home in Vermont has telephone service. Broadband DSL service, however, suffers from technical limitations. DSL service is frequently impracticable more than three miles beyond the DSLAM or comparable facility, which is often located in the central switch. Many Vermont telephone customers live outside this limit and thus cannot expect to be served by DSL service.

The result is that cable modem service is today available to many customers who probably will not be able to buy DSL service at any time in the foreseeable future. Satellite technology is in flux, and is expensive. Therefore, for many Vermont customers, cable modem is the only practicable and affordable access to broadband facilities. As such, cable modem service is a bottleneck facility.

C. Cable Modem Providers Have an Incentive to Limit Their Customers' Communications Using Cable Modems, and They Have the Means To Do So.

The Commission asked whether any cable modem provider is likely to deny “click through” access to any customer seeking access to an Internet site.⁸ The Vermont Agencies offer no evidence of this. However, the Vermont Agencies do submit that cable modem providers

⁷ Even with this relatively aggressive standard, many Vermont customers who live in the lowest density areas do not receive cable service. For these customers, satellite technology and possibly ground-based wireless technology may offer the only opportunities to purchase broadband service.

have the incentive and the means to restrict customer access, possibly in more subtle ways that would not be likely to cause a customer immediately to change ISPs or even immediately to notice the restriction.

The potential scope of control can be seen in the behavior of the Peoples Republic of China. Attached to these comments as Appendix A is a news story from Reuters summarizing the pattern of Chinese behavior in blocking and unblocking Internet access to various western news sources. Affected web news sources included Reuters, CNN, the Washington Post, The New York Times, the Los Angeles Times, National Public Radio, the San Francisco Chronicle, the Boston Globe, the Atlanta Journal-Constitution, Time Magazine, the Voice of America and the BBC's news site. Certainly no Internet service provider in the United States today would consider imposing such draconian restrictions, and if it did, consumer reaction would be swift and severe. Yet although the analogy is inexact, it does show what potentially could happen.

Broadband facility owners in the United States have increasing commercial and political motives to engage in more subtle forms of control. They may promote particular sources of news or particular points of view. The risk to consumers is enhanced when, as has increasingly been true in the past few years, content providers and facilities owners are merging or otherwise joining common economic enterprises.⁹ Increasingly, facilities owners have financial interests in

⁸ NPRM ¶ 86.

¹⁸ Political motives may also be influential. Providers may support or oppose particular legislation in Congress or in the states. They could impede access to opposing points of view, or even block that access entirely. Carriers could provide benefits to certain legislators and deny those benefits to other legislators.

¹⁹ Lessig, Lawrence, *The Future of Ideas, The Fate of the Commons in a Connected World*, Random House, New York, 2001, at 156.

²⁰ *Id.* at 158.

other commercial entities and sources of information, including news networks. Under these circumstances, broadband owners have a commercial motive to steer customers to preferred sources and away from other competitors.

Political motives may also be influential. Providers might support or oppose particular legislation in Congress or in the states, or they might support or oppose particular regulatory actions. The providers could impede access to opposing points of view, or even block that access entirely. Carriers could provide benefits to certain legislators and deny those benefits to other legislators. All of this could diminish a fundamental element of democracy itself, the free and open exchange of information and ideas by citizens.

On May 1, 2000, Time Warner Cable systems in New York, Philadelphia and Raleigh-Durham N.C. ceased broadcasting the ABC television network. The interruption continued for 39 hours.¹⁰ This incident provides a useful case study in how commercial and political motives can affect the behavior of cable modem providers. In April of 2000, Time Warner had a commercial dispute with the Walt Disney Company, the owner of ABC. A political dimension was also present. A New York Times article noted that Disney had raised concerns about the pending proposed merger between Time Warner and AOL, suggesting that a merger would leave

⁹ This risk also increased with the lifting of the ban on cross-ownership of cable and telephone facilities. In 1992, the FCC recommended repeal of the cable-telephone company cross-ownership ban and modified its rules to enable some local telephone company participation in cable services. *See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54- 63.54-63.58*, CC Docket No. 87-266, *Second Report And Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking*, 7 F.C.C.R. 5781 (rel. August 14, 1992). Then Congress lifted the cable-telephone company cross-ownership ban in the 1996 Act. *See* 47 U.S.C. § 533(b); *see also City of Dallas v. FCC*, 165 F.3d 341 (1999).

¹⁰ Rutenberg, *Media; Reconstructing the Genesis of a Blunder*, New York Times, May 8, 2000.

AOL Time Warner with “too much power in the coming age of interactive television.”¹¹ At the end of April, the negotiations failed, and on May 1 Time Warner turned off the ABC signal.

This incident involved cable broadcasting, not the Internet, but it is instructive nevertheless. Time Warner had both commercial and regulatory interests at stake. If it was willing to totally block popular television shows because of its dispute with Disney, it is hard to maintain that, in the future, cable modem providers will eschew the many ways of restricting the Internet that are far less obvious and therefore far less likely to prove self-damaging.

Facilities owners not only have the incentive to control the information sent and received by customers, but they have the ability to do so. A cable modem provider can make access to disfavored sources difficult, complex or time consuming. One minimally intrusive means is to prominently display advertising from preferred sources and refuse advertising from disfavored sources. More insidiously, a provider can use search engines that steer customers away from disfavored sources or use caching technology to delay the arrival of signals that are not from preferred sources.

Cable modem service providers have not historically been subject to common carriage requirements, and they have been at the leading edge in restricting Internet access. According to Professor Lessig, cable companies have already taken steps to use their control of the operating system's architecture to favor some applications over others.

others.

¹¹ A spokesman for Disney explained that Time Warner might discriminate against supplemental on-demand news provided by ABC, while allowing that feature for Time Warner's own new services. Similarly, he expressed concern that Time Warner's on-screen programming guides might promote Time Warner's programming over offerings from other companies. Rutenberg, *ABC Goes Off Cable Systems In Key Markets*, New York Times, May 1, 2000.

[F]irms such as Cisco . . . are deploying technologies to enable the ‘walled garden’ Internet. The [facilities owner’s] network is built to prefer content and applications within the garden; access to content and applications outside the garden are ‘disfavored.’ ‘Policy-based routing’ replaces the neutral ‘best efforts’ rule. The content favored by the policy becomes the content that flows most easily.¹⁹

Moreover, Professor Lessig reports that these strategies are no longer just ideas in development at computer labs; they have moved into the business plans of broadband providers. Companies that own cable can, and do, steer unknowing customers toward merchants that partner with the facilities’ owner. They can do this “through code and marketing – through placement of ads, as well as through ‘how do I’ wizards that direct customers to selected sites.”²⁰

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D. The Commission Should Establish A Right of Each Cable Modem Customer to Unrestricted Internet Access.

We have seen that cable modem providers have an incentive and the means to restrict Internet usage by their customers. To some extent such restrictions are self-policing. At least some such restrictions on Internet access would be apparent to customers, who can be expected to object. In a competitive market where customers have a choice among broadband providers,

¹⁹ Lessig, Lawrence, *The Future of Ideas, The Fate of the Commons in a Connected World*, Random House, New York, 2001, at 156.

²⁰ *Id.* at 158.

customers can deter this undesirable behavior by selecting another provider. We have also seen that cable modem service is a bottleneck facility for many customers. Even assuming that Internet restraint would be perceived by customers and objected to, a bottleneck market can leave a customer with no alternative provider.

If a single entity has unified control of a cable modem customer's connection, that entity can use its control to dominate the selection of the content that each citizen ultimately sees. If that control is linked to the political preferences of the controlling entity, there is a significant risk to the most fundamental element of democracy itself, the openness of information access.

For these reasons, customers need a government-backed guarantee. The Commission should announce and establish the right of cable modem customers to have unrestricted Internet access. That means a customer should have the right to reach any part of the Internet without restriction and at a speed and ease of use comparable to that provided by independent or competing Internet Service Providers. The following actions, if taken by a cable provider, would violate that right:

1. Preventing a customer from exchanging data with any site on the Internet.
2. Making it unreasonably difficult for a customer to "click through" to another ISP.
3. Requiring a customer to take more steps in order to reach certain sites on the Internet than is required for other comparable sites.¹³

¹³ Technical limitations may make it impossible to apply this standard to the difference between a cable modem provider's own ISP and another ISP. It would apply, however, as between two unaffiliated ISPs.

4. Requiring a customer to wait longer for data transmitted by certain sites on the Internet than is required for other comparable sites.¹⁴

This right affects only the relationship between the customer and the cable modem provider. It does not alter the customer consequences of the customer's behavior as to any other party. For example, if a customer used the Internet to violate child pornography laws, the customer might still be prosecuted under criminal laws. Likewise, a customer who uses the Internet to defraud another person might be liable criminally and civilly, unaffected by the right asserted here.¹⁵

The NPRM stated that the Commission is unaware of any circumstances in which a customer has been denied "click through" access to the Internet by a cable modem provider.¹⁶ Likewise, commenting parties such as Adelphia have stated that they are unaware of any allegations that there has been a single case in which any cable operator has actually engaged in any activity designed to 'relegate' certain sites to the 'slow' lane.¹⁷

Nevertheless, the Commission should act now. Even if no such restrictions have been imposed to date, and even if no other inappropriate restrictions have been placed on contacts with other web sites, it is essential for the Commission to establish and announce the consumer's

¹⁴ Technical limitations may make it impossible to apply this standard to the difference between a cable modem provider's own ISP and another ISP. It would apply, however, as between two unaffiliated ISPs.

¹⁵ This is similar to the limitations that apply to the right to communicate on the facilities of a common carrier. Customers may be penalized, for example, for making obscene, threatening or anonymous phone calls. Government can shut off discourse to protect others from hearing where substantial privacy interests are being invaded in an essentially intolerable manner, such as where communication occurs in the home. *See Cohen v. California*, 403 U.S. 15, 21 (1971). *See generally*, Huber, Kellogg, Thorne, *Federal Telecommunications Law*, 2d ed. (Huber), 1999 Aspen Law and Business, §14.7.2.

¹⁶ NPRM ¶ 87.

rights now, when the disruption to the existing systems will be minimal. If carriers are not today violating the openness principle, there should be nearly no cost to establishing that principle now. Later, if restrictions on customer access become pervasive, they may have substantial commercial significance, and it will be much more disruptive at that time to establish the principle of open access.

E. A Right of Unrestricted Internet Access on a Cable Modem Will Be Very Similar to the Rights of Telephone Customers Under Title II.

The importance of unrestricted Internet access is illustrated by the historic centrality of the analogous principle in communications common carriage. As common carriers, local exchange companies must provide “service on demand”¹⁸ to customers or offer service to all customers indiscriminately. Under prior FCC decisions and the definition of the term “telecommunications,” common carriers must transport all information that their customers wish to send or receive as part of their common carrier duties.

This duty is so fundamental that it was included in the Act’s definition of “telecommunications.” Under 47 U.S.C. § 153(48), Congress defined telecommunications as: “the transmission between or among points specified by the user of *information of the user’s choosing*, without change in the form or content of the information as sent or received.” Thus, the Congress recognized the importance of this fundamental right, and enshrined it in the very definition of telecommunications.¹⁹

¹⁷ NPRM footnote 316.

¹⁸ 47 U.S.C. § 201(a).

¹⁹ The rights of customers of common carriers are broader than the legal rights of customers of media, such as newspapers. A valid distinction exists between newspaper or broadcast media

Commission decisions for many years have recognized this part of “common carriage.” More than thirty-five years ago, the Commission explicitly stated that a common carrier must transmit whatever “intelligence” its customer chooses.

and a monopoly control over a user’s broadband access to the Internet. Fundamentally, there is a distinction between a “carrier” and a “medium.” A medium, such as a newspaper, has the power to select its content without regard to the desires of its customers, and the customer’s only recourse is economic.

[T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or *transmit intelligence of their own design and choosing* between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication *for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier*. The aforementioned fundamental concept of a communications common carrier applies even though the public offering is limited to a special classification of service which restricts the customer's choice to intelligence permissible within such class of service offering.²⁰

The Supreme Court has cited this language with approval.²¹

Similarly, a common carrier may even refuse service to a customer who uses the carrier's facilities for certain purposes, such as for "dial-a-porn."²² But for these limited exceptions, customers of a common carriage service have a fundamental right to choose the information they send and receive.

II. FORBEARANCE IS NOT WELL DEFINED AND HENCE IS NOT JUSTIFIED

The Commission has tentatively concluded that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service.²³ The Act provides that once the

²⁰ *Amendment of Parts 2, 91 and 99 of the Commission's Rules Insofar As They Relate To The Industrial Relocation Services*, 5 FCC 2d 197 (1966), at ¶ 19 (citations omitted)(emphasis added).

²¹ *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

²² *See Carlin Communications, Inc. v. Southern Bell Tel.*, 802 F.2d 1352 (11th Cir. 1986).

²³ NPRM ¶ 95.

Commission forbears, a State commission may not continue to apply or enforce any provision of this Act subject to that forbearance.²⁴

The NPRM defines “cable modem service” simply:

Cable modem service provides high-speed access to the Internet, as well as many applications or functions that can be used with that access, over cable system facilities.²⁵

Unfortunately, the Commission has not provided a clear definition or explanation of the boundaries of “cable modem service.” The NPRM never explains which “applications or functions” are included beyond data access to the Internet. For this reason, the NPRM is fatally vague in providing notice of the issues under consideration here, and it cannot support a forbearance decision.

The introductory portions of the NPRM discuss the importance of ubiquitous “broadband” deployment.²⁶ This suggests that the Commission may intend primarily to address data (non voice-carrying) services. On the other hand, the language might be construed to cover many services similar to those provided by the legacy telecommunications network and regulated under Title II of the Communications Act. Because of this ambiguity, the scope of the Commission’s contemplated forbearance action is unclear.

The following two tables illustrate some of the ambiguities in the NPRM. They show a range of voice applications that are provided using cable modems and that might be subject to forbearance, depending upon how the Commission ultimately construes the term. In the first table, the cable provider uses only its own transmission facilities. In the second table, transmission is also provided over the Internet. In each table, three services are described. They differ based upon the originating equipment, the data path, and the terminating equipment.

²⁴ 47 U.S.C. § 160 (e).

²⁵ NPRM ¶ 1 (footnotes omitted).

²⁶ NPRM ¶ 4.

Table I. Transmission Using Only Cable Provider's Facilities						
	Service Summary	Originating Equipment:	Data Path:	Terminating Equipment:	Uses PSTN?	"Cable Modem Service"?
1.	Voice Over Cable Modem (VOCM)	Computer and cable modem connected to cable provider's headend	Cable providers' interconnecting facilities	Computer and cable modem connected to originator's cable provider (or an affiliated cable provider's headend)	No	Probably Yes
2.	VOCM plus PSTN Termination	Same as #1	Same as #1, but also involves transmission on PSTN.	Computer on cable provider's system or a telephone	Yes	Uncertain
3.	Short-range Local Exchange Service	Telephone and cable modem connected to cable provider's headend	Same as #2	Computer on cable provider's system or a telephone	Yes	Uncertain

Case 1 illustrates computer-to-computer voice communication. It is similar to the current usage of Voice Over the Internet Protocol, except that Internet facilities are not used and geographic calling scope is therefore limited to the customers served by the cable provider's headend.²⁷ Although voice is transmitted, the experience is very unlike traditional telephone service. For example, the calling party has nothing resembling a "dial tone." It seems likely that the Commission intended to include this service within the Declaratory Ruling and NPRM, and thus within the scope of contemplated forbearance.

In the second case, the originating party connects in the same way, but the cable provider terminates the call using the Public Switched Telephone Network (PSTN).²⁸ Here the calling party gains one of the important advantages of the PSTN, he or she can initiate a call to anyone

²⁷ It is possible under the DOCSIS standards to interconnect headends, however, thus creating a potential for a network parallel to both the PSTN and the Internet.

with a telephone and can notify the caller that a communication is sought. Geographic coverage may be limited, however, to those customers that have cable modem service from the cable provider (or its affiliates). Still, from the calling party's point of view, this is probably a cable modem service, since it is initiated by a computer connected to the cable provider's system. From the called party's point of view, however, this communication is simply an incoming telephone call. The NPRM is not clear about whether the Commission considers this service to be "cable modem service" and thus subject to potential forbearance.

In the third case, the originating party also uses telephone equipment. Otherwise, the signal travels in the same way as in the previous case. Although the originator's telephone is connected to the cable provider's Network Interface Device (NID), the signal is multiplexed along with computer-generated data from the same subscriber, and is transmitted over the same wires as television and data. Thus the calling party experiences this communication as a telephone call. Indeed, except for possible limitations on geographic reach, this communication has the basic elements of phone-to-phone local exchange service.²⁹ The NPRM is not clear about whether the Commission considers this service to be "cable modem service" and thus subject to potential forbearance.

In the preceding three cases, transmission facilities were either entirely localized or were based upon bilateral agreements between two cable providers. Table II shows how the same three services change when the Internet is available for long-range transmission.

²⁸ This connection to the PSTN can be accomplished through the cable provider's purchased facilities or purchased from an independent party.

²⁹ The cable provider may or may not also provide other traditional indicia of local exchange service, such as operator services and emergency services.

Table II. Internet Transmission Available						
	Service Summary	Originating Equipment:	Data Path:	Terminating Equipment:	Uses PSTN?	Covered by Order?
1I.	Voice Over Cable Modem plus Internet (VOCMI)	Computer and cable modem connected to cable provider's headend	Cable providers' interconnecting facilities plus Internet	Computer connected to Internet	No	Probably Yes
2I	Cable MODEM WATS	Same as #1I above	Same as #1I above, plus termination completed through PSTN.	Computer or telephone	Yes	Uncertain
3I.	Local Exchange Service	Telephone and cable modem connected to cable provider's headend	Same as #2I above	Computer or telephone	Yes	Probably No

In this second set of cases, connection to the Internet has increased the value of the service, but it also has increased the similarity to traditional telephone service. In the first case (#1I), the computer-to-computer connection is now coextensive with Voice-Over-Internet. A caller with a computer can communicate by voice with any other computer connected to the Internet. It seems likely that the Commission intended to include this service within the Declaratory Ruling and NPRM, and thus within the scope of contemplated forbearance.

In the second case (#2I), the calling party, still initiating the call by computer, is still able to terminate on a telephone. However, because the Internet is used for transmission, the receiving telephone can be anywhere in the world.³⁰ The service is thus very similar to outgoing "Wide Area Telephone Service (WATS)" services that have been offered for decades by telecommunications companies. The major difference is that the outgoing call must be

originated on a computer. The NPRM is not clear about whether the Commission considers this service to be “cable modem service” and thus subject to potential forbearance.

In the third case (#3I), the calling party initiates the call using a telephone rather than a computer. Since the caller can reach telephones worldwide, this service now contains all the basic elements of local exchange service: a telephone in the subscriber’s house can ring and converse with other telephones worldwide. In that sense, the service is now fully equivalent to local exchange telephone service. We understand from informal discussions with FCC staff that the Commission probably does not consider this service to be “cable modem service” and thus would not be subject to potential forbearance. If we are correct, the Commission should clarify this point in its final order.

As the NPRM suggests, forbearance may indeed be appropriate for a limited set of non voice-carrying services. We argued above that the Commission should establish an unrestricted right to access the Internet. Having done so, however, the Commission may find that consumers are not presently at risk and can be adequately protected without regulation. Any forbearance should be limited in scope, however, and should apply solely to non voice-carrying communications using the Internet. Furthermore, forbearance should be provisional, and parties should be explicitly permitted to show in the future that industry behavior makes reestablishing regulation necessary to protect consumer rights.

Of the six kinds of communication services described above, we think that the commission probably intends to include two (#1 and #1i) within its contemplated forbearance. We understand that the commission probably does not consider one service (#3i) to be “cable modem service,” and thus it would presumably be excluded from forbearance (although the

³⁰ The calling party’s cable provider must have some means of obtaining access to the PSTN for termination, and would presumably add a charge to the subscriber’s bill to cover the added cost.

NPRM does not clearly state this). That leaves the Commission's intent uncertain in three of the six cases. Such ambiguity cannot provide an adequate record to support forbearance, unless the forbearance is limited solely to non voice-carrying services. For example, the commission cannot forbear as to service (#2I), which amounts to a functional equivalent of Wide Area Telephone Service. The public has not had an adequate opportunity to comment on whether forbearance meets the statutory criteria. For example, regulation may be necessary for the protection of consumers or to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the service provider are just and reasonable and are not unjustly or unreasonably discriminatory.

Moreover, forbearance appears to be unwarranted on the merits for voice-carrying telephone-like services. Cable networks seem to be evolving as parallel networks to the PSTN. Moreover, they are evolving many of the same functionalities as the legacy network. It is now possible for two customers to have a "telephone call" that does not interact in any way with the legacy telephone network. In the near future, millions of customers may have a choice for their telephone services between cable providers and traditional carriers. Furthermore, many varieties of intermediate services may exist that do not amount to full-blown telephone service but that nevertheless merit some of the protections provided in the Act. It would be unwise for the Commission to declare now, without careful study, that any voice-carrying cable modem service is exempted from regulation through the forbearance power. To the extent that cable modem-based services function like telephone services, there are dozens of regulatory restrictions (some of which arise from explicit provisions of the Communications Act itself) that might be appropriate for these cable modem-based services. The Commission should not, and particularly on the present notice, sweep away all such consumer protections.

III. THE COMMISSION HAS INSUFFICIENT AUTHORITY TO PREEMPT A STATE'S REGULATION OF AN INFORMATION SERVICE.

The Commission seeks comment regarding the extent to which it should preempt state and local regulation of cable modem service. The Telecommunications Telecommunications

s provided by common carriers, and do not apply to information services provided by entities not regulated under Title II. The Commission may not preempt state regulation of cable modem service through the interstate classification. Preemption is a Constitutional doctrine arising from the Supremacy Clause of the U.S. Constitution, Art. VI, cl.2. Federal preemption invalidates state laws or regulations, which conflict with federal law, and may be express or implied. *See e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). To the extent that state regulation of information services do not conflict with federal law, they are not preempted. *In re Petition of Verizon New England, Inc. d.b.a. Verizon Vermont*, — Vt — , Docket No. 2000-118 (Feb. 22, 2002), Slip Op at 17-18.

For two reasons, the Commission's decision to classify cable modem service as an information service in the Declaratory Ruling precludes preemption of state and local regulation. First, the classifications "interstate" and "intrastate" apply to telecommunications services provided by common carriers. 47 U.S.C. § 152. There is no legal basis to conclude that the terms give the Commission any authority as to information services not regulated under Title II. The Commission concluded in the Declaratory Ruling that cable modem service is an information service without a separate offering of a telecommunications service. This means that cable modem service is not subject to certain regulatory provisions of the Telecommunications Act, such as those regarding rate regulation, 47 U.S.C. § 205, and non-discriminatory access, 47

U.S.C. § 202. The Commission's limited authority over these information services provides no legal basis for preemption of state regulation.

Additionally, the very definition of "information services" precludes any preemption of state regulation. The Commission may affirmatively preempt state and local regulation only to the extent authorized by federal law, which in this case extends only to communications by wire or radio. 47 U.S.C. § 152. Information services are by definition a "capability," 47 U.S.C. § 153 (20), not a communication. Therefore, the Commission has no legal basis to preempt.

IV. THE COMMISSION DOES NOT HAVE SUFFICIENT RESOURCES TO PROPERLY PROTECT CUSTOMERS OF CABLE MODEM SERVICES.

Cable modem service has been widely deployed in Vermont during the last few years. The Vermont subsidiaries of Adelphia Communications Corporation in particular have recently expanded their offering of "Power Link," its cable modem offering. During the fall of 2001 and early winter of 2002, Adelphia customers were quite dissatisfied with their cable modem service. During the period from September 1, 2001 to February 1, 2002, the Vermont Department of Public Service received 147 complaints regarding Power Link service. During this same period, complaints about Power Link comprised 21.6 percent of the total complaints filed at the Department involving telecommunications. Given Vermont's small population, a significant failure by a large cable modem provider at the national level could produce thousands of complaints.

Most of the complaints were concerned with poor response times and slow data transfer rates. Customers also frequently complained of being "dropped" or "disconnected" by the Power Link server. The complaints had a variety of causes. While Adelphia had aggressively marketed its Power Link service, it did not have sufficient transmission capacity to handle the data flows at

peak periods. This compromised the quality of service available to most customers. Also, Adelphia did not train sufficient new employees to handle complaints filed by new Power Link users. The lack of trained personnel, combined with the capacity problems, resulted in extremely long wait times and inconsistent or inaccurate responses to consumers once they reached a customer service person.

The Vermont Agencies were able to pressure Adelphia to resolve this problem because the Public Service Board is the franchising authority in Vermont, and there was no thought at the time that cable modem service was beyond the state's jurisdiction. The Commission's March Order and NPRM change all that, however.

In short, the Vermont Agencies have direct and recent experience with how the public reacts to poor cable modem service. Since cable modem service has been declared to be an interstate information service, however, we presume that the Commission will be prepared to answer these complaints in the future. We encourage the Commission to take early steps to substantially upgrade its complaint-handling field staff. If the Commission takes the jurisdiction, it should offer customers plausible assurances that it can handle their complaints. Vermont customers should receive full and adequate responses, comparable to the complaint handling process now provided by the Vermont Department of Public Service, for any and all complaints filed at the Commission regarding such interstate information services.³¹ The Commission does not now have resources sufficient to this task, nor is it likely to receive such resources.

V. CONCLUSION

³¹ We noted above that the Commission has not clearly defined "cable modem service" in its NPRM. To the extent that "cable modem service" includes voice services similar to those provided by telecommunications carriers, the problem of handling customer complaints will be exacerbated.

If the Commission's declaration that cable modem service is an interstate information service is upheld, the Commission should also establish a right to of each cable modem customer to unrestricted Internet access. While forbearance with regard to non voice-carrying services may be justified, the NPRM is fatally deficient in failing to define the scope of the declaratory ruling as to voice-carrying services, and in any case no forbearance is warranted as to such services. The Commission has insufficient authority to preempt state regulation of information services, and it should understand that if its declaration stands, it is likely to face a significant upsurge in customer complaints to which it will be unable to respond adequately, given the resources that it currently has or has any reasonable chance of procuring. Finally and of utmost importance, the Commission needs to state now that it will not forbear or otherwise refrain from ensuring that every American citizen has a right of unrestricted, content-neutral access to the Internet.

Respectfully submitted,

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Appendix A – Reuters News Article from May, 2002.

BEIJING (Reuters) - China appears to have lifted long-standing blocks on the Web sites of several Western news organizations that were freely accessible through local Internet connections in Beijing and Shanghai on Thursday.

There was no official announcement explaining why normally censored Web sites, including those of Reuters, CNN, and the Washington Post, were unexpectedly open.

Foreign news organizations have lobbied hard for China to lift blocks on their sites, which Web-savvy Chinese already access through proxy servers, but Beijing remains deeply suspicious of foreign media, especially in the run-up to a leadership reshuffle expected later this year. The reason for the apparent lifting of the blocks was not immediately clear and it was not known if the measure would be permanent.

In October, when Shanghai hosted a meeting of Asia-Pacific heads of state, several Western news Web sites were unblocked, but shortly after the weeklong forum ended China's Internet censors clamped back down.

Officials at the International Press Centre under the Foreign Ministry and the Information Office of the State Council, China's cabinet, said they were unaware the previously censored Web sites had been opened.

The Ministry of State Security, believed to be at least in part responsible for the blocks, declined comment and officials at the Ministry of Information Industry were unavailable.

Several Western diplomats were also surprised to hear that the Web sites were accessible. China unblocked The New York Times Web site last year after Chinese President Jiang Zemin said he would look into the matter in an interview with senior Times editors.

On Thursday, the sites of the Los Angeles Times, National Public Radio, the San Francisco Chronicle, the Boston Globe and Atlanta Journal-Constitution could also be accessed.

Time Magazine, the Voice of America and the BBC's news site (news.bbc.co.uk), however, appeared to be still blocked.